

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DEBORAH H. BEATON,

Plaintiff,

v.

JPMORGAN CHASE BANK N.A.,  
NORTHWEST TRUSTEE SERVICES, INC.

Defendant.

NO. 11-CV-0872-RAJ

**DEFENDANT CHASE'S REPLY  
TO PLAINTIFF'S RESPONSE IN  
OPPOSITION TO CHASE'S FRCP  
12(b)(6) MOTION TO DISMISS  
PLAINTIFF'S [FIRST] AMENDED  
COMPLAINT FOR DAMAGES**

**RE-NOTED DATE:** February 10, 2012

**I. INTRODUCTION AND RELIEF REQUESTED**

Plaintiff's Opposition [Dkt. 46] to Defendant JPMorgan Chase Bank, N.A.'s ("Chase") FRCP 12(b)(6) Motion to Dismiss Plaintiff's [First] Amended Verified Complaint for Damages [Dkt. 34] is premised on a single claim that Chase has not responded to Plaintiff's rightful discovery.

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1 Plaintiff's Opposition fails because:

2 1. Plaintiff never propounded discovery to Chase;

3 2. Plaintiff's [First] Amended Verified Complaint for Damages [Dkt. 34] must  
4 stand or fail on its own merits, regardless of discovery status; and

5 3. Not having addressed the merits of Chase's motion, Plaintiff has  
6 acknowledged both that it is meritorious and the defects in all of her claims, pursuant to  
7 Local Rules W.D.Wash. CR 7(b)(2).

8 Because Ms. Beaton was previously given leave to amend to state claims against  
9 Chase and was unable to do so, her [First] Amended Complaint [Dkt. 34] should be dismissed  
10 with prejudice.

## 11 II. STATEMENT OF ADDITIONAL FACTS

12 At the same time as she filed her [First] Amended Complaint [Dkt. 34], Ms. Beaton  
13 also filed a pleading captioned "Plaintiff's **Proposed** Plan for Discovery and Depositions"  
14 [Dkt. 35 (emphasis in original)]. The first sentence of the pleading states, "Plaintiff hereby  
15 submits the following *proposal for the substance of the discovery and depositions* as  
16 required by the Court's order and FRCP 26f." (Emphasis supplied.) The document was  
17 filed and served on October 7, 2011. It does not specify a reasonable time, place, and  
18 manner for any document inspection, as required by Fed. R. Civ. P. 34(b)(1)(B).

19 On receipt and after brief review of the pleading, Chase's counsel understood that it  
20 was a statement, as captioned and referenced therein, of Plaintiff's intended future  
21 discovery plan under Fed. R. Civ. P. 26(f)(3), and was not itself intended to serve as  
22 written discovery propounded to Chase. Chase's counsel was recently informed by

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1 counsel for the co-defendant, Northwest Trustee Services, Inc., that she, too, independently  
 2 formed the same understanding. Accordingly, Chase's counsel did not prepare responses  
 3 to "Plaintiff's **Proposed** Plan for Discovery and Depositions" [Dkt. 35 (emphasis in  
 4 original)].

5 It was not until Chase's counsel reviewed Plaintiff's Opposition [Dkt. 46] to  
 6 Chase's dismissal motion that she first learned Plaintiff believes Chase has failed to  
 7 respond to discovery. In the four months since the pleading was filed, Plaintiff never  
 8 communicated with Chase's counsel concerning either an expectation that responses were  
 9 required, that Chase had failed to respond, or that responses were past due.

### 10 III. AUTHORITY AND ARGUMENT

#### 11 A. Discovery Status is Irrelevant and Inconsequential to a Dismissal Motion.

12 Despite Plaintiff's sole claim that Chase failed to respond to discovery and produce  
 13 requested documents to her, the simple fact is that Plaintiff never propounded any  
 14 discovery to Chase. "Plaintiff's **Proposed** Plan for Discovery and Depositions" [Dkt. 35  
 15 (emphasis in original)] is not and cannot be a Fed. R. Civ. P. 34 request for production of  
 16 documents to Chase because:

17 1. It is captioned as a proposed discovery plan, and the body states that it is a  
 18 proposed discovery plan;

19 2. It references therein its satisfaction of Plaintiff's requirement to formulate a  
 20 Fed. R. Civ. P. 26(f)(3) discovery plan;

21 3. It was filed with the Court as a pleading, rather than retained by a party as  
 22 discovery;

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1           4.       It makes no reference to Fed. R. Civ. P. 34;

2           5.       It does not specify a reasonable time, place, and manner for any document  
3 inspection, as required by Fed. R. Civ. P. 34(b)(1)(B); and

4           6.       Despite the fact that it was served four months ago, Plaintiff never once  
5 expressed to any other party a belief that discovery was outstanding and responses to it  
6 were required.

7           Even if the discovery plan could somehow be construed as actual discovery  
8 propounded to Defendants, however, the fact that it was not answered cannot and does not  
9 serve to defeat or delay ruling on Chase's dismissal motion.

10          Dismissal is appropriate where, accepting the facts alleged *only* in the complaint as  
11 true, it appears beyond doubt that the plaintiff can prove no set of facts in support of his  
12 claim which would entitle him to relief. *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197,  
13 2200, 167 L.Ed.2d 1081 (2007); *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9<sup>th</sup> Cir. 1983)  
14 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). In ruling  
15 on a dismissal motion, the court may generally consider *only* allegations contained in the  
16 pleadings, exhibits attached to the Complaint, and matters properly subject to judicial  
17 notice. *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).

18          Plaintiff's Complaint must stand or fail on its own merits. If Plaintiff believed  
19 recorded instruments are critical to an understanding of her claims, she could have attached  
20 them to her Complaint or requested they be judicially noticed. After two opportunities, she  
21 has not done so.

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1 The status of discovery is irrelevant to Chase's dismissal motion. It should be  
2 granted.

3 **B. Plaintiff's Failure to Address Chase's Arguments Constitutes an Admission**  
4 **that They are Meritorious.**

5 Plaintiff did not address or mention a single claim or cause of action in her  
6 Opposition, nor did she attempt to rebut any of Chase's arguments for dismissal.

7 In this District, "If a party fails to file papers in opposition to a motion, such failure  
8 may be considered by the court as an admission that the motion has merit." (Local Rules  
9 W.D.Wash. CR 7(b)(2).) The rule applies not only when the party neglects to oppose a  
10 motion, but opposes it and neglects to provide any controverting argument in support of his  
11 claims. (See, e.g., *Siver v. Citimortgage, Inc.*, --- F.Supp.2d ----, 2011 WL 5548010, \*5  
12 (W.D.Wash.) ("[Plaintiffs' opposition briefing] offered absolutely no response to  
13 [Defendant's] motion to dismiss their breach-of-contract claim, which the court construes  
14 as an admission that the motion has merit. See W.D. Wash. Local Rule CR 7(b)(2).  
15 Accordingly, the court dismisses the [Plaintiffs'] breach-of-contract claim ...."); *Hylkema*  
16 *v. Assoc. Credit Svc., Inc.*, 2012 WL 13681, \*9 (W.D.Wash.) ("Plaintiff does not respond  
17 to this argument or otherwise address his CPA claim in his opposition and cross-motion.  
18 Plaintiff's failure to respond is considered a concession that defendants' argument has  
19 merit. Local Civil Rule 7(b)(2). ... Plaintiff's CPA claim is, accordingly, subject to  
20 dismissal on summary judgment."); *Castello v. City of Seattle*, 2011 WL 6000781, \*8  
21 (W.D.Wash.).

22 In view of the authorities cited in Chase's dismissal motion, and Ms. Beaton's  
23 complete failure to respond to those arguments and authorities, her [First] Amended  
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1 Complaint should be dismissed, with prejudice.

2 **IV. CONCLUSION**

3 Pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiff's [First] Amended Complaint should be  
4 dismissed against Chase for its failure to state a claim upon which relief may be granted. In  
5 addition, the instruments recorded by Plaintiff are without any legal basis, frivolous, and  
6 should be stricken. Simply put, after two attempts and several rulings by this Court, Plaintiff  
7 has failed to establish that she has any viable claims against Chase.

8 Based upon the foregoing, Chase respectfully requests the Court dismiss Plaintiff's  
9 claims with prejudice, and extinguish and release the instruments recorded by Plaintiff.

10 Dated this 7<sup>th</sup> day of February, 2012.

11 /s/ Barbara L. Bollero

12 David A. Weibel, WSBA #24031

13 Barbara L. Bollero, WSBA #28906

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